1097—

SUPREME COURT OF THE UNITED STATES.

No. 168.

JACOB LE ROY, PLAINTIFF IN ERROR,

vs.

THEOPHILUS NICHOLS.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX

	Original.	Print.
A. Writ of error - - - - - - - - - -	1	2
B. Return - - - - - - - - - - -	2	2
C. Citation - - - - - - - - - - -	3	3
D. Judgment record - - - - - - - - -	4	3
E. Bill of exceptions - - - - - - - - -	18	9
Assignment of errors - - - - - - - - -	54	37
Joinder in error - - - - - - - - - -	55	38

J. & G. S. Gideon, printers.

A.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the southern district of [L. S.] New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Theophilus Nichols, plaintiff, and Jacob Le Roy, defendant, a manifest error hath happened, to the great damage of the said Jacob Le Roy, as is said, and as appears by his complaint; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday of January, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

ALEX'R GARDINER,
Clerk of the circuit ct. of the U. S. of America, for the southern dist. of New York, in the 2d circuit.

B.

The answer of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things touching the same, are hereby respectfully sent to the justice of the Supreme Court of the United States within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fifteenth day of October, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventy-first.

ALEX'R GARDINER, *Clerk*.

Allowed. SAM'L R. BETTS.

C.

By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Theophilus Nichols.

Whereas, Jacob Le Roy lately issued out of the Supreme Court of the United States a writ of error, directed to the judges of the circuit court of the United States for the southern district of New York, second circuit, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between Theophilus Nichols, plaintiff, and Jacob Le Roy, defendant, a manifest error hath happened, to the great damage of the said Jacob Le Roy; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the city of Washington on the first Monday of December next. You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States the seventieth.

SAM'L R. BETTS.

I admit due service of the above, New York, May 27th, 1846.

JOHN BIGELOW,
Attorney for defendant in error.

D.

CIRCUIT COURT OF THE UNITED STATES,
Fb. the 2d circuit and southern dist. of N. York:

Pleas before the justices of the supreme court of judicature of the people of the United States of America, at the City Hall in the city of New York, of the term of April, in the year one thousand eight hundred and forty-one.

Witness Roger B. Taney, esq., chief justice.

J. W. METCALF, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK,
City and county of New York, ss:

Be it remembered, that on the 24th day of June, in the term of April, in the year one thousand eight hundred and forty-one, before the justices of the Supreme Court of the United States of America, at the City Hall in the city of New York, came Theophilus Nichols, who is a citizen of the State of Connecticut, by E. Seeley, his attorney, and brought into the said court, before the aforesaid justices thereof then there, his certain declaration against Jacob Le Roy, who is a citizen of the State of New York, being in custody, &c., of a plea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Theophilus Nichols, who is a citizen of the State of Connecticut, by E. Seeley, his attorney, complains of Jacob Le Roy, who is a citizen of the State of New York, being in custody, &c., of a plea of trespass on the case upon promises; for that whereas, heretofore, to wit, on the seventh day of November, in the year of our Lord one thousand eight hundred and thirty-six, at Milwaukie, in the Territory of Wisconsin, to wit, at the city of New York, in the district aforesaid, the said Jacob Le Roy, the defendant in this suit, in consideration of the sum of one thousand and eight hundred dollars, then and there paid to him by the said plaintiff, at the said defendant's request, caused to be made and delivered to the said plaintiff a certain writing, or instrument of conveyance, signed by him and his wife, Charlotte D. Le Roy, purporting thereby, and containing therein, that the said defendant and Charlotte D. his wife, for and in consideration of one thousand eight hundred dollars, in hand paid by the said plaintiff, the receipt whereof was thereby acknowledged, had granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents did grant, bargain, sell, remise, release, alien, and confirm, unto the said plaintiff, and his heirs and assigns, for ever, all that certain piece or parcel of land, situated in the town of Milwaukie, and Territory of Wisconsin, viz: one equal undivided acre of land, in fifty-seven and sixty-hundredths acres, (57 60-100;) said fifty-seven and sixty-hundredths acres being in lot number three (3) of the southeast fractional quarter of section number thirty-two (32) in township seven north, of range twenty-two east, it being part of the same tract of land conveyed to them (meaning said defendant and Charlotte D. his wife) by Levi C. Turner, of Cooperstown, Otsego county, State of New York, as by his deed bearing date the twenty-eighth day of April, one thousand eight hundred and thirty-six, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever, of the said defendant and Charlotte D. his wife, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises, as above described, with the appurtenances, unto the said plaintiff, and to his heirs and assigns, to their sole and proper use, benefit, and behoof, for ever; and further purporting and containing therein, that the said defendant, and Charlotte D. his wife, for their heirs executors, and administrators, (among other things) did thereby covenant, grant, bargain, and agree, to and with the said plaintiff, and his heirs and assigns, that at the time of the ensealing and delivering those presents, (meaning thereby the making and delivering of the said writing or instrument of conveyance,) the said defendant and Charlotte D. his wife were well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and had good right, full power, and lawful authority, to grant, bargain, sell, and convey the same in man-

ner and form as aforesaid, as by the said writing or instrument of conveyance ready to be produced will more fully and at large appear. And the said plaintiff avers, that relying upon the said title in fee, so purporting to be conveyed by the said defendant and Charlotte D. his wife, and upon their right, power, and authority to grant, bargain, sell, and convey the said premises as aforesaid, and upon the said agreement of the said defendant, that he was well seized as aforesaid, and had the right, power, and authority as aforesaid, he, the said plaintiff, did then and there pay to the said defendant the consideration as aforesaid, to wit, the sum of one thousand eight hundred dollars, and accept[ed] the said writing or instrument of conveyance from the said defendant.

Nevertheless, the said plaintiff further in fact avers, that the said defendant, and Charlotte D. his wife, were not, nor was either of them at the time of making and delivery of the said writing, or instrument of conveyance, well seized of the premises purporting to be thereby conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, nor of any estate or title whatsoever; nor had the said defendant, and Charlotte D. his wife, or either of them, good right, full power, and lawful authority, to grant, bargain, sell, and convey the said described premises in manner aforesaid, nor any right, power, or authority whatsoever, to grant, bargain, sell, and convey the said described premises, or any part of the same.

By means of all which several facts aforesaid the said defendant then and there became liable to pay to the said plaintiff the sum of money aforesaid, to wit, the said sum of one thousand eight hundred dollars, when he, the said defendant, should be thereunto afterwards requested; and being so liable, and the said sum of money being and remaining wholly due and unpaid, he, the said defendant, afterwards, to wit, on the day and year aforesaid, to wit, at the city of New York aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money when he, the said defendant, should be thereto afterwards requested.

And whereas also, heretofore, to wit, on the day and year last aforesaid, at Milwaukie aforesaid, to wit, at the said city of New York, the said defendant and Charlotte D. Le Roy, his wife, in consideration of a certain other sum of one thousand eight hundred dollars, then and there paid to the said defendant at his special instance and request, as and for the purchase money, by a certain other writing by them made and signed, sold and conveyed to the said plaintiff, in fee simple, a certain other piece or parcel of land, situated at Milwaukie aforesaid, to wit, one certain other equal undivided acre of land, in a certain tract consisting of fifty-seven and sixty hundredths acres; and the said defendant thereby then and there agreed with, and promised the said plaintiff, (among other things,) that they, the said defendant and Charlotte D., his wife, were then and there well seized of the said last mentioned conveyed premises as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and had good right, full power, and lawful authority to sell and convey the same in manner and

form as last aforesaid; and the said plaintiff in fact says, that confiding in the said agreement and promise in this count mentioned, he did then and there accept the said last mentioned sale and conveyance, and pay to the said defendant the purchase money or consideration last aforesaid, to wit, the said sum of one thousand eight hundred dollars; and the said plaintiff further in fact avers that the said defendant his said agreement and promise in this count mentioned did not keep and perform the same, but on the contrary thereof broke the same, in this, to wit, that the said defendant and Charlotte D., his wife, were not, nor was either of them, seized of the said last mentioned premises as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, nor of any estate or title whatsoever in the said premises; nor had the said defendant and Charlotte D., his wife, or either of them, good right, full power, and lawful authority to sell and convey the same in manner and form as aforesaid, nor any right whatsoever; and by reason whereof the said last mentioned piece or parcel of land then and there became and was wholly lost to the said plaintiff; of all which said several premises in this count mentioned the said defendant afterwards, to wit, on the day and year last aforesaid, at Milwaukie aforesaid, to wit, at the city of New York, had no notice, and thereby the said defendant became liable to refund and repay to the said plaintiff the said last mentioned purchase money or consideration, to wit, the said sum of one thousand eight hundred dollars, when he should be thereto afterwards requested; and being so liable he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Milwaukie aforesaid, to wit, at the city of New York, undertook and then and there faithfully promised the said plaintiff to refund and repay to him the said last mentioned sum of money when he should be thereto afterwards requested.

For that whereas, also, the said defendant, on the seventh day of November, one thousand eight hundred and thirty-six, at Milwaukie aforesaid, to wit, at the city of New York, was indebted to the said plaintiff in the sum of five thousand dollars, lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this count mentioned when the said defendant should be thereunto afterwards requested. And whereas also the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said de-

fendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear, and indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff the said defendant hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff of five thousand dollars; and thereof the said plaintiff brings suit, &c.

And the said Jacob Le Roy, defendant in this suit, by J. Blunt, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, the said defendant; and of this he puts himself upon the country, and the said plaintiff likewise, &c.

And for a further plea in this behalf to the first and second counts in the declaration of the said plaintiff, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said defendant was well seized, at the time of making the said writing described in the declaration of the said plaintiff, of a good, perfect, absolute, and indefeasible estate of inheritance in the said premises therein described, and had good right to grant, bargain, sell, and convey the same, and this the said defendant is ready to verify; wherefore he prays judgment whether the said plaintiff his aforesaid action thereof against him ought further to have or maintain, &c.

And the said Theophilus Nichols, as to the said plea of the said defendant by him secondly above pleaded, saith, that he, the said plaintiff, by reason of any thing in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the said defendant was not well seized, at the time of making the said writing described in the declaration of the said plaintiff, of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the premises therein described, and had not good right to grant, bargain, sell, and convey the same in manner and form as the said defendant hath above in his second plea in this behalf alleged; and this the said plaintiff prays may be inquired of by the country; and the said defendant likewise, &c.

And hereupon the process thereof is continued between the parties aforesaid of the pleas aforesaid, in this same court, before the judges thereof, until the last Monday of November, in the year of our Lord one thousand eight hundred and forty-four, at the City Hall in the city of New York; and the same day is given to the parties aforesaid, at the place aforesaid.

At which last mentioned day, before the judges aforesaid, at the place aforesaid, come the parties aforesaid by their respective attorneys aforesaid, and hereupon to try the issues so as above joined let the marshal summon a jury of twelve lawful jurymen to come before the judges of the circuit court of the United S ates, for the southern district of New York, on the first Monday of April next, twelve of whom, &c., each of whom, &c., because as well, &c.; the same day is given to the parties aforesaid at the place aforesaid.

And now at this day, that is to say, on the first Monday of April, in the year one thousand eight hundred and forty-five, before the said judges of the circuit court of the United States, for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, come as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his said attorney, and the jurors of the jury summoned to try the said issues being chosen, tried, and sworn, also come, who, to speak the truth of the matters above contained, say upon their oaths, that the said defendant did undertake and promise in manner and form as the said plaintiff has above thereof complained against him, and they assess the damages of the said plaintiff by reason of the premises, over and above his costs and charges by him about his suit in this behalf expended, to two thousand eight hundred sixty-two dollars and twenty-five cents, and for those costs and charges to six cents.

And because the said court of the people of the United States of America are not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid, of the plea aforesaid, in this same court, before justices thereof, until the first Monday of April, in the year one thousand eight hundred and forty-six, at the City Hall, in the city of New York, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon.

At which said last mentioned day, before the said justices, at the place last aforesaid, come the parties aforesaid, by their respective attorneys aforesaid; and hereupon, all and singular the premises being seen, and now here by the court fully understood, and mature deliberation being nad thereupon, it seems to the said court now here, that the verdict aforesaid, in form aforesaid given, is good and valid in law.

Thereupon it is considered by the said court now here, that the said plaintiff do recover against the said defendant his said damages, costs, and charges so as aforesaid, by the jurors aforesaid, in form aforesaid assessed; and also five hundred and fifteen dollars and 12½ cents, for his costs and charges by him about his suit in this behalf expended, by the said court now here adjudged of increase to the said plaintiff with his

assent; which said damages, costs, and charges in the whole amount to three thousand three hundred and twenty-seven dollars and thirty-seven and a-half cents. And the said defendant, in mercy, &c.

Signed this 20th May, 1846.

ALEX. GARDINER, *Clerk*.

E.

CIRCUIT COURT OF THE UNITED STATES,
For the southern district of New York,
in the second circuit.

JACOB LE ROY
ads.
THEOPHILUS NICHOLS.

Bill of exceptions to be attached to the record.

Afterwards, to wit, at the circuit court held at the City Hall, in the city of New York, for the second circuit, and southern district of New York, on the seventh day of April, 1845, before the honorable Samuel Nelson, circuit judge of the said circuit, the aforesaid issue so found between the parties as aforesaid came on to be tried by a jury of the city and county of New York aforesaid, for that purpose duly empannelled, good and lawful men of the said district.

At which day came as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid empannelled to try the said issue, being called, also come and were then and there in due manner chosen and sworn to try the said issue; and upon the trial of the said issue, the counsel for the said plaintiff, to maintain and prove the said issue on his part, read in evidence a power of attorney from the defendant and wife to Elisha Starr, dated August 31, 1836, duly acknowledged and recorded, which, with the certificates thereon, were read in evidence to the jury, in the words and figures following, to wit:

Know all men by these presents, that we, Jacob Le Roy and Charlotte D. Le Roy, his wife, of the town of Le Roy, in the county of Genesee, and State of New York, have constituted and appointed, and by these presents do constitute and appoint, Elisha Starr, of the same place, our true and lawful attorney, for the purposes following, to wit: In the name of the said Jacob Le Roy, and for his use and benefit, to expend and invest certain moneys for that purpose herewith placed by him in the hands of the said Starr, in the purchase of lands and real estate in some of the Western States and territories of the United States, at the discretion of the said Starr, and to take the certificates, titles, deeds, or other evidences of such purchases to and in the name of the said Jacob Le Roy; and also, for and in the names of the said Jacob Le Roy and Charlotte D. Le Roy, to contract for the sale of, and to sell, either in whole or in part, the lands and real estate so purchased by the said Starr with the money herewith furnished him, or any other lands or real estate heretofore purchased in the said States or Territories, by the said Starr or Suffrencis Dewy, for the said Jacob Le Roy, and

now owned by him, or any lands which may have been bought with the avails of the lands so purchased as aforesaid, or for which the same may have been exchanged, to such person or persons, for such consideration, and on such terms, in all respects, as the said Starr shall deem most advantageous; and for us, and in our names, to execute to the purchaser or purchasers thereof, the assignments, contracts, or deeds of conveyance necessary for the full and perfect transfer of all of our respective right, title, and interest, dower and right of dower, as sufficiently, in all respects, as we ourselves could do personally in the premises; and generally, as the agent and attorney of the said Jacob Le Roy, to purchase lands or real estate with the money now furnished him, and to sell, resell, and exchange the same, or any lands heretofore purchased by him for the said Jacob Le Roy, or any lands or real estate that he may acquire in consideration of the sale or exchange of the same, to such persons, and on such terms, in all respects, as he may deem most eligible; and to do all acts legally necessary for the perfect transfer to such persons of the title of the same; we hereby ratifying and confirming whatsoever our said attorney shall do in the premises, by virtue of these presents, until the first day of July next, 1837; from and after which day, these presents, and the powers conferred thereby, shall cease, and be null and void.

Sealed with our seals, and dated this thirty-first day of August, 1836.

JACOB LE ROY, [L. S.]
CHARLOTTE D. LE ROY. [L. S.]

In presence of—

STATE OF NEW YORK, *Genesee county, ss:*

On the 31st day of August, 1836, personally appeared before me the within named Jacob Le Roy and Charlotte D. his wife, to me well known to be the same persons described in the within instrument of writing, and who executed the same, and duly acknowledged that they executed the said instrument in writing; and the said Charlotte D. being by me examined separate and apart from her said husband, acknowledged that she executed said instrument in writing, freely, without the fear or compulsion of her said husband.

CHARLES DANFORTH,
Judge of Genesee county court, and counsellor at law in the supreme court.

Recorded September 16th, A. D. 1836, at 9 o'clock, A. M.

REGISTER'S OFFICE, *Milwaukie county, Wisconsin Territory.*

I do hereby certify, that the above and foregoing is a true copy of the record now remaining in this office.

[L. S.] In testimony whereof, I have hereunto set my hand, and affixed my seal officially, on the 16th day of August, A. D. 1841.

CYRUS HAWLEY, *Register of deeds, Milwaukie county, Wisconsin Territory.*
By F. W. HAWLEY, *Deputy.*

The counsel for the plaintiff next read in evidence, subject to the objection of the counsel for defendant, the deposition of Elisha Starr, taken in this cause pursuant to the act of Congress, in the words and figures following:

Deposition of witnesses produced, examined, cautioned, and sworn to speak the whole truth, before me, an associate judge of the supreme court of Wisconsin territory, in a certain cause now pending in the circuit court of the United States, for the southern district of New York, between Theophilus Nichols, plaintiff, and Jacob Le Roy, defendant, on the part of the plaintiff.

Elisha Starr, of Milwaukie, in said territory, of lawful age, being carefully examined, cautioned, and sworn, says, that he has seen exhibit marked A, annexed to the deposition of Hans Crocker, taken in this cause, which is a deed executed by said deponent, as attorney in fact of Jacob Le Roy and Charlotte D. Le Roy, his wife, to Theophilus Nichols, the plaintiff, dated November seventh, eighteen hundred and thirty-six, of one acre of land undivided in lot three, of section number thirty-two, township seven, range twenty-two, the consideration of which is eighteen hundred dollars. This deed was executed by deponent by virtue of a power of attorney in writing, from Jacob Le Roy and his said wife to deponent. Said power of attorney is hereto attached, marked A. The acre mentioned in the deed here referred to was purchased by deponent, as such attorney for said Jacob Le Roy, from Levi C. Turner. The price paid by said Nichols for this acre was eighteen hundred dollars, one-third of which deponent believes was paid in cash at the date of said conveyance, and the remainder in two notes of six hundred dollars each, payable in six and twelve months to said Jacob Le Roy, or order, at the Bank of America, in the city of New York. These notes were sent to said Le Roy, and the money deponent thinks was held by himself on account of said Le Roy, and he had settled with him and was accountable to him for it. Deponent acted as attorney of said Le Roy until June, eighteen hundred and thirty-seven, and made a number of purchases and sales under this power, and rendered an account of the sales to said Le Roy from time to time, and of this among others. The map marked B, and hereto annexed, represents the location of this lot, of the village of Milwaukie, and of the Milwaukie and Menominee rivers. Said lot number three is worth at this time about one hundred dollars per acre. The lot was not improved, on account of the failure of the title, which is a principal cause of its depreciation in value. The main part of the village of Milwaukie is from half a mile to one mile from this lot, and principally built since these sales.

(Signed) ELISHA STARR.

Certified by A. G. Miller, associate judge of the supreme court of Wisconsin territory, Oct. 4, 1842.

The counsel for the plaintiff next called as a witness on his part William Beard, who, being duly sworn testified that he knows the defendant by sight, and is acquainted with the plaintiff. That witness

was at Milwaukie in November, 1836; that Mr. Nichols, the plaintiff, Mr. Baldwin, and witness were there together; they all resided then, and still reside at Newtown, in the State of Connecticut. They had a dealing with Elisha Starr at that place, as the attorney or agent of the defendant. Witness then purchased from Starr, as such agent, an undivided acre of land in fraction 3, section number 32, township 7 north, range 22 east, situated at Walker's Point. The plaintiff also purchased from Starr, as such agent, another undivided acre in the same fraction of section at the same time, for the sum of eighteen hundred dollars; he paid six hundred dollars down, and gave his two notes, payable to the order of the defendant, for six hundred dollars each, at the Bank of America, New York, at six and twelve months from date, with seven per cent. interest. The plaintiff, Mr. Baldwin, and witness all acted together in the business, and each of them took an acre of the same fraction of said section from the defendant upon the same terms. A deed was delivered to the plaintiff by Mr. Starr, as agent or attorney for the defendant, and to Mr. Baldwin and witness at the same time. They all returned to Connecticut, within a few days after witness wrote a letter to the defendant on the subject, on the twenty-eighth of August, 1838.

Being shown a paper by the counsel for the plaintiff, the witness testified that it was in his handwriting.

The counsel for the defendant here admitted due service of the notice to produce the said letter, and being called upon to produce the same, declined on the ground that he had not got it.

The witness then testified that the paper so shown to him was a copy of a letter written by him to the defendant, and mailed at Newtown, Connecticut, to his address at Le Roy, New York. The said copy of letter was then read in evidence, in the words and figures following:

NEWTOWN, *August* 28, 1838.

JACOB LE ROY, ESQ.:

DEAR SIR: I take the liberty of forwarding to you the following information by advices lately received from my attorney at Milwaukie. I learn that the title of the property I purchased of you at Milwaukie in November, 1836, has failed in consequence of the Indian title not being extinguished when the property was floated. I further learn that the receiver or land officer has been directed to refund the purchase money to the original purchaser, and that the subject has been before the Solicitor of the Treasury, and he has decided that the property belongs to the Government, and that an appeal was taken from his decision to the Secretary of the Treasury, who confirmed the decision.

If so, you are doubtless aware that, upon your covenants of warranty, you are liable to refund to me the purchase money, which I shall expect you to do, together with the interest on the same. If a deed of release or quit-claim will be of any service to you, you can have one when the money is refunded.

I shall be happy to hear from you on the receipt of this, and any proposition you may have to make regarding the premises will be duly considered. Your obedient servant,

(Signed) WILLIAM BEARD.

The witness further testified that the paper produced and shown to him by plaintiff's counsel is the answer which he received by mail to the letter so written to this defendant; the said letter was then read in evidence in the words and figures following, to wit:

LE ROY, *2d September*, 1838.

DEAR SIR: I received last evening yours of the 28th, and the contents surprised me not a little, that I, who held large possessions in Milwaukie, and in constant communication with that place, should receive the first intelligence of so great a misfortune from you. I received a letter three days ago from that place, but not a word is said about any trouble, and I have therefore come to the conclusion your agent has been hoaxed; the whole statement carries on the face of it an absurdity; admitting that any thing had occurred as you state, have not the United States received the same amount there from their land as they have elsewhere? Do you imagine that Congress would allow innocent persons to suffer in a case of that kind? I have written to Milwaukie by this day's mail to ascertain if there is any difficulty, and in the interim would beg you to keep easy in mind, for you may rest assured that your title will never be disturbed.

Respectfully, yours, truly,

(Signed) JACOB LE ROY.

The witness further testified that he wrote another letter to the defendant on behalf of himself, Mr. Baldwin, and plaintiff, about the first of June, 1839; that he did not keep a copy of it; that he received an answer by mail, and the papers shown to him by plaintiff's counsel is such answer. The counsel for the plaintiff then read the said letter in evidence, in the words and figures following, to wit:

NEW YORK, *12th June*, 1839.

WILLIAM BEARD, ESQ.,

SIR: Your letter of the 1st instant was returned to me this day from Le Roy. In reply I state, that the title to the lands purchased from me is derived from the United States, and I know of no mode by which a sale can be rescinded by any officer of the Government (when) it has been once consummated. If any error has been committed, of which I have no information upon which reliance ought to be placed in transactions of business, the Government will no doubt correct it. Besides, as my grantor is liable to me if there is any defect of title, I can make no voluntary settlement without increasing the difficulties. There were many purchasers at the public sales of the lands of which those I sold are a part, who have sold out, and it cannot be possible, if there is any substantial legal defect in the sale, that the question will not soon receive the adjudication of some sufficient legal tribunal, when I shall always be willing to fulfil any legal claims which I may be under to you or your friends.

With respect, yours, &c.

JACOB LE ROY.

On cross examination on the part of the defendant, by his counsel, this witness testifies that he wrote the letter of 28th August, 1838, and mailed it himself. That he could not say if any one was with him at the time he mailed it, as he did not remember whether Mr. Baldwin was then their postmaster. That he read the letter to Mr. Baldwin before he sent it, and sealed it and put it in the post office. He believes he gave it to the postmaster personally, as that was his usage. Witness wrote it at his own house, and does not remember whether he sealed it at Mr. Baldwin's store or at the post office.

The counsel for the plaintiff next called as a witness David V. B. Baldwin, who being sworn testified that he is the person referred to by Mr. Beard in his testimony. The counsel for the plaintiff then produced and read in evidence a letter of the defendant directed to the plaintiff, in the words and figures following, to wit:

NEW YORK, 5 *Feb'y*, 1841.

DEAR SIR: Yours addressed to me at Le Roy came to hand in due course, being returned to this place. In reply to your remarks I have only to say, that so soon as the highest tribunals of our country shall decide that my title to the land sold you is defective, I shall be ready to settle with you on just principles; but until then I must decline all negotiations. You say that the title is bad. Perhaps you are not aware that an act passed the Senate of the U. S. at its last session, *unanimously* confirming the sale, and was only lost in the House for want of time. I am in great hopes that relief will be obtained this session; but at any rate a long time cannot now elapse before justice will be done us; for a more righteous claim there cannot be. My situation is the same as yours. Until such decision is made, I cannot make claim from those from whom I purchased.

With great respect, yours, truly,
JACOB LE ROY.

THEOPHILUS NICHOLS, ESQ., *Newtown*.

The counsel for the plaintiff next read in evidence a deposition of Elisha Starr, (subject to the objection of the defendant's counsel,) taken in this cause pursuant to the act of Congress on the 11th February, 1845, in the words and figures following, to wit:

Depositions of witnesses produced, examined, cautioned, and sworn, to speak the whole truth, before me, an associate judge of the supreme court of the Territory of Wisconsin, in a certain cause now pending in the circuit court of the United States, for the southern district of New York, between Theophilus Nichols, plaintiff, and Jacob Le Roy, defendant, on the part of the plaintiff.

Elisha Starr, of Milwaukie, in said territory, of lawful age, and being carefully examined, cautioned, and sworn, says, that he has seen the exhibit, marked A, annexed to the deposition of Hans Crocker, taken October 3d, 1842, in this same cause; that said exhibit is a deed executed by deponent as attorney in fact of Jacob Le Roy and Charlotte D., his wife, to Theophilus Nichols, the plaintiff, dated November 7th,

1836, of one acre of land, undivided, in lot three, of section 32, in town. 7, range 22, the consideration of which is eighteen hundred dollars. This deed was executed by deponent by virtue of a power of attorney in writing, from said Jacob Le Roy and his said wife, to deponent, which is annexed to a former deposition of this deponent, taken October 4, 1842, in the case of William Beard, plaintiff, against Jacob Le Roy, defendant, pending before the circuit court of the United States for the southern district of New York. The acre mentioned in the deed was purchased by this deponent for said Le Roy from Levi C. Turner, by virtue of the same power of attorney, and was paid for in funds and property belonging to said Jacob Le Roy. The price paid by said Nichols was eighteen hundred dollars, as follows, to wit: Six hundred dollars in cash, or a certificate of deposite issued by a New York city bank, and the balance in two notes of six hundred dollars each, payable one in six months, and the other in twelve months, to the order of Jacob Le Roy, at the Bank of America in the city of New York, as deponent thinks. The notes given by the said Nichols were sent to Le Roy as his property. The money was kept by said deponent on account of said Le Roy. The deponent acted as attorney for said Le Roy until June following, made a number of purchases and sales under this power of attorney, and rendered an account of sales from time to time, and of this, among others, to said Le Roy; and held himself accountable for all monies received, and from time to time made remittances to said Le Roy. It was not known that the title to this land had been disturbed at Washington for more than one year after the sale. At the time deponent purchased in said lot three for said LeRoy of said Turner, he purchased eleven acres or more. Said Turner claimed title under a sale by the land office at Green Bay, in 1835, to one Linus Thompson, by or under a float. Deponent did not know the particulars of the sale to Thompson until after the sale was set aside at Washington in the winter of 1837 and '38. Deponent has not heard of Turner's claiming under any other title, nor of said lot three being sold by Government to any other person or persons until the sale of the fall of 1844. The map, marked B, annexed to the former deposition of this deponent, taken Oct. 4, 1843, in the case in which William Beard is plaintiff, and Jacob Le Roy defendant, heretofore mentioned, represents the location of the said lot three of the village of Milwaukie, and of the Milwaukie and Menominee rivers. Said lot is worth at this time from one to two hundred dollars per acre. It has been but slightly improved on account of the failure of the title. It is from half a mile to one mile from the main business part of the city.

(Signed,) ELISHA STARR.

The counsel for the plaintiff next read in evidence the notes of the plaintiff given on the purchase of said land, with the endorsements thereon, in the words and figures following, to wit:

MILWAUKIE, *7th November*, 1836.

Six months from date, for value received, I promise to pay to the

order of Jacob Le Roy, at the Bank of America, in the city of New York, the sum of six hundred dollars, with interest at seven per cent.
$600. THEOPHILUS NICHOLS.

(Endorsed.)—Pay Herman Le Roy, or order.
JACOB LE ROY,
HERMAN LE ROY.

MILWAUKIE, *7th November*, 1836.

Twelve months from date, for value received, I promise to pay to the order of Jacob Le Roy, at the Bank of America, in the city of New York, the sum of six hundred dollars, with interest at seven per cent.
$600. THEOPHILUS NICHOLS.

(Endorsed.)—Pay Herman Le Roy, or order.
JACOB LE ROY,
HERMAN LE ROY.

The counsel for the plaintiff next read in evidence the deposition of Hans Crocker, in this cause, taken pursuant to the act of Congress, in the words and figures following, to wit:

Depositions of witnesses produced, examined, cautioned, and sworn to speak the whole truth, before me, an associate judge of the supreme court of Wisconsin Territory, in a certain cause now pending in the circuit court of the United States, for the southern district of New York, between Theophilus Nichols, plaintiff, and Jacob Le Roy, defendant, on the part of the plaintiff.

Hans Crocker, of Milwaukie, in said Territory, of lawful age, being carefully examined, cautioned, and sworn, saith, that on the seventh day of November, 1836, he resided in Milwaukie aforesaid; that exhibit marked A, annexed to a deposition of this deponent, taken on the third day of October, eighteen hundred and forty-two, in the case of the said Theophilus Nichols, against said Jacob Le Roy, pending before the circuit court of the United States, for the southern district of New York, being a deed executed by the said Jacob Le Roy and Charlotte D., his wife, by Elisha Starr, their attorney in fact, to the said Theophilus Nichols, was executed by the said Elisha Starr as such attorney, in the presence of this deponent, who witnessed the execution of the same, and subscribed his name thereto as a witness. Deponent cannot state positively, but believes the deed was executed the day it bears date. The words "seven north, of range twenty-two east," interlined in the description of the premises in said deed, were inserted by and in the handwriting of this deponent in the presence of, and at the request of the parties, and before the execution of said deed.

(Signed) H. CROCKER.

The counsel for the plaintiff then offered to read in evidence the deed or instrument of conveyance executed by the defendant by Elisha Starr, his attorney, to the plaintiff, with a scroll and the word "Seal" written therein, opposite the name of the defendant, as subscribed in exe-

1105.

cution thereof, without any wafer, wax, or other tenacious substance being affixed thereto; referred to in, and proved by, the said depositions. The counsel for the defendant objected to the reading of the covenants contained in said deed so offered, on the ground that the power of attorney from the defendant to Starr, did not authorize Starr to enter into such covenants on behalf of the defendant.

The court overruled the objection, and the defendant's counsel excepted.

The said deed was then read in evidence to the jury, in the words and figures following, to wit:

A.

This indenture, made this seventh day of November, in the year of our Lord one thousand eight hundred and thirty-six, between Jacob Le Roy and Charlotte D. Le Roy, wife of said Jacob, both of Le Roy, Genesee county, State of New York, by Elisha Starr, now of Milwaukie, in the Territory of Wisconsin, their lawful attorney, parties of the first part; and Theophilus Nichols, of Newtown, Fairfield county, and State of Connecticut, party of the second part, witnesseth: that the said party of the first part, for and in consideration of one thousand eight hundred dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, one certain piece or parcel of land, situated in the town of Milwaukie, and Territory of Wisconsin, viz: One equal undivided acre of land, in fifty-seven and sixty-hundredths acres, ($57\frac{60}{100}$,) said fifty-seven and sixty-hundredths acres being the township lot number three (3) of the south-east fractional quarter of section number thirty-two, (32,) in said township seven north, of range twenty-two east, it being part of the same tract of land conveyed to us by Levi C. Turner, of Cooperstown, Otsego county, State of New York, as per his deed, bearing date the twenty-eighth day of April, one thousand eight hundred and thirty-six; together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances; to have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns, to their sole and only proper use, benefit, and behoof, forever. And the said parties of the first part, by their attorney as aforesaid, for their heirs, executors, and administrators, do covenant, grant, bargain, and agree, to and with the said party of the second part, and his heirs and assigns, that at the time of the ensealing and delivering these presents we are well seised of the premises above conveyed as of a good,

sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid. And that the same are free and clear of all incumbrances of what kind and nature soever. And that the above bargained premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, they will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

JACOB LE ROY, [L. S.]
By Elisha Starr, his attorney.
CHARLOTTE D. LE ROY. [L. S.]
By Elisha Starr, her attorney.

Sealed and delivered in presence of—
HANS CROCKER,
DAVID V. B. BALDWIN.

TERRITORY OF WISCONSIN, *Milwaukie county, ss:*

On this seventh day of November, A. D. 1836, came before me the within named grantors, Jacob Le Roy and Charlotte D. Le Roy, his wife, by their attorney, Elisha Starr, and severally acknowledged, by their said attorney, that they executed the within deed for the uses and purposes therein mentioned.

CYRUS HAWLEY, *Notary public.*

Received for record, on the 8th day of November, A. D. 1836, at 9 o'clock, A. M., and recorded in vol. B of deeds, pages 382 and 383.
ALBERT FOWLER, *Reg. Mil. co.*

The counsel for the plaintiff then read in evidence the deposition of Charles S. Frailey, taken in this cause pursuant to the act of Congress, in the words and figures following, to wit:

IN THE CIRCUIT COURT OF THE UNITED STATES,
For the southern district of New York.

THEOPHILUS NICHOLS
vs.
JACOB LE ROY.

CITY OF WASHINGTON, *District of Columbia, ss:*

Charles S. Frailey, being duly cautioned, sworn, and examined, doth depose and say, that he is a clerk in the General Land Office, and the one having charge of all matters in said office relative to claims under the various pre-emption laws of the United States, concerning the public lands, (except a specific class of such claims in the State of Louisiana.) That on or about the 8th day of November, instant, this deponent, in the discharge of his official duty, prepared in part, and in

1106.

part caused to be prepared under his direction, certain copies of files, records, and certificates, in the office of the Commissioner of said General Land Office, to which, in his own handwriting, he added the words of the authenticating certificate attached thereto. That the seal of the said office, and the signature of the said commissioner, having been affixed to said certificate of authentication, the then certified copies were enclosed (with a letter bearing date 8th November, instant, signed by said commissioner, and addressed to E. Seeley, esq., New York) in an envelope bearing a similar address, and the package placed, with the other letters and packages of that day, preparatory to their being sent to the city post office. That for the more perfect identification of the copies to which this deponent refers, he further deposeth and says, that one page thereof (the number given to the same not recollected) consists of an extract from the tract book of said office, and copies of certificates No. 5, No. 6, No. 22, and No. 24, of the Green Bay land office; all of which, with the copies of the endorsements on the latter, and certain explanatory references on said extract, are in the same handwriting as this deposition, being that of this deponent. That such extract from the tract book above referred to, indicates all the sales or other disposition by the Government of the United States, of the land therein referred to, shown by said tract book, (in which all such sales or other disposition of such land are required to be posted or noted,) and all such sales or other disposition of said land, known to this deponent through or by any of the records or papers in said office. And this deponent further says, that said copies, before referred to, are the only copies of papers in said office, which were prepared under the direction of, or by this deponent, for transmission to said E. Seeley.

CHARLES S. FRAILEY.

Sworn to before W. Cranch, chief justice of the circuit court of the District of Columbia, on the 22d November, 1842.

The counsel for the plaintiff next read in evidence, subject to the objection of the defendant's counsel, a copy of a map and of papers and documents from the General Land Office at Washington, referred to in the testimony of Charles S. Frailey, and certified under the seal of the General Land Office, by Thomas H. Blake, then the commissioner thereof, in the words and figures following, to wit:

No. 37.

Chicago treaty, of 27th September, 1833.

Case of pre-emption to the Notta-wa-se-pe reserve in Michigan, O. P. Lacy, agent, and of Powell, Grignon, Nevill, Gleason, and L. & J. Vaux, at Root river, Wisconsin.

GENERAL LAND OFFICE,
Solicitor's Bureau, Feb. 21, 1837.

SIR: In these cases, referred to me for my opinion as to the day when the treaty took effect, and also when these lands became subject to pre-emptions, under act of June, 1834, I have the honor to state, that the

treaty took effect on the twenty-first February, one thousand eight hundred and thirty-five, the day it was ratified by the President and Senate of the United States. The general rule is, that treaties are obligatory upon the parties from the date of the signatures, upon third parties from the date of the ratification. This rule only applies when the contracting powers have neglected to stipulate the day on which the treaty is to go into operation. In the treaty in question the parties stipulated as follows: "This treaty, after the same shall have been ratified by the President and Senate of the United States, shall be binding on the contracting parties." The Senate, on their part, ratified by two resolutions, one dated 22d May, 1834, the other 11th February, 1835. No part of the treaty as yet became obligatory upon any body. Something more had been contracted for, to wit, ratification by the President. He gave that by proclamation the day I have stated. It is the only ratification this treaty ever received from him. This opinion shows that no pre-emption to these lands was granted by the act, 19th June, 1834. There could have been no possession under that act. It was Indian lands in 1834, of which no white man could be possessed, could be a "settler or occupant," agreeably to the act. The pre-emptions claimed are all void, and must be disallowed. The error in the arguments of counsel arises from the assumption of premises that are unsound. They should not have overlooked the stipulation of the treaty, and reasoned upon the subject as though the contract of the parties had not given a day from which only the treaty was to bind them. Having done this, the contract cannot be construed so as to make it cover by relation the time that elapsed between its date and ratification. When the rule of construction as to date is given by contract, all other rules must yield to it. The cases cited by Mr. Carroll, Fisher vs. Hamden, and Hylten's Lessee vs. Brown, are both cases arising under the treaty of peace with Great Britain, of 1782, in which no stipulation was made as to the day when the treaty was to become obligatory. They are not inconsistent with the rule I have laid down. I conceive they are consistent with, and in support of it. It will dispose of the pre-emptions in Michigan, and two of the floats laid on section 9 at Root river, to wit, the floats of Lewis Vaux and Jacques Vaux. The floats being void, the location is void also.

The cases of Powell, Grignon, Nevill, and Gleason, are cases of floats located, or attempted to be located, on section 9, at the mouth of Root river, Wisconsin territory. The question arises, were the lands "public lands," subject to location? What was understood by the term as used in the act of 1834? Was it not such lands as the United States owned, of which the freehold and right of occupancy was in them? As to the soil and jurisdiction, the United States have always owned them; their title has been perfect, save only the Indian right of occupancy; this they contracted for at Chicago, and the contract is, that their right shall be absolute, (three years after the date of the treaty,) or sooner, if convenient for the Indians to remove west of the Mississippi. See last clause of 2d article, stipulating that the Indians shall retain possession

1107

north of Illinois without molestation or interruption, and under the protection of the laws of the United States. This protection, among other things, is a prohibition to intrusions by white persons on lands which they have the right to possess; the protection of their possessory right, of the only title which they ever owned, as is said by the supreme court. The Indian title is not then extinguished, and the law of 1834 does not authorize a sale of these lands. Some of the Indians yet remain on the cession; while any so remain, they all have the free and uninterrupted right to every part and parcel of the territory, and no white man can say, you shall keep off from section 9, or from any other portion of it. The able counsel urge, that a legal title may pass to the pre-emptors, subject to this reservation to the Indians. That if the Indians do not complain of the interference, no other person can plead it. They are mistaken. A patent issued without authority is void. If the Executive should patent the entire public domain, his patent would be worth less than so much blank parchment; the title would still be in the United States, unless the law authorized the sale. So in these cases, if the law does not authorize the sale until the Indian right is extinguished, patents will be void if issued, and being void other persons than Indians will plead and prove the Indian right of occupancy, to show that it is void. The final result will be, that the parties would lose their title and improvements, and only gain the vexation of a ruinous and expensive law suit. It is the best thing for them, however thankless the task, to stop the proceedings here. If patents have issued to others in like cases, (as the counsel intimates,) timely notice should be given them, so that the endless scenes of litigation that will otherwise surely come may be avoided. I have purposely omitted many points urged by counsel, having no time to spend on unnecessary work. If my decision shall operate prejudicially to the applicants, I can only regret it. The farther one is deluded in a stray path, the greater is his misfortune. But arguments upon the hardships of the laws should be addressed to Congress. We cannot sell lands where they have not given us the power. My opinion is not "novel;" that word is more applicable to the decision made by the officers at Green Bay, and the construction put upon the law and treaty by counsel. The attorney general decided that the pre-emption act did not authorize the sale of the lands while the Indians retained the right to remain upon it. The fact that the Government stipulated in this treaty for the right to survey and sell that part of the territory lying in Michigan, before the final removal of the Indians, should have been sufficient notice to every person that, without such contract, Government did not claim the right to sell the lands while the possessory right was with the Indians.

I am, very respectfully, your most obedient servant,

M. BIRCHARD, *Solicitor*.

To JAMES WHITCOMB, *Commissioner*.

No. 61.

GENERAL LAND OFFICE,
Solicitor's Bureau, March 23d, 1837.

SIR: I have reviewed my former report, No. 37, and believe that the general conclusion therein expressed is correct. Many of the remarks which Mr. Carroll seems to think immaterial, in one sense may appear as such; that is, they are not so apparently applicable to his client's cases as they were to other cases disposed of by that report. The material difference between myself and the able counsel is, as to the effect of the law, and not what is the law. The case of the United States vs. Arredondo et al., 6 Peters, 748, I think is in accordance with all the decisions quoted, and to me it seems to quiet these cases. The court there says, (speaking of the treaty of cession by Spain,) "But the ratification by the United States was in February following, and the treaty did not take effect till its ratification by both parties operated, like the delivery of a deed, to make it the binding act of both." I apply this rule to the treaty in question, because it is a decision that is "authority." It is one that a lawyer may comprehend. What is the effect of the delivery of a deed? It is in law the first moment that it operates as a conveyance. Before delivery by the grantor it passes not a shadow of title. An execution levied between the date and delivery will hold the land, because the title is in the grantor at the time of the levy; and if the deed is not delivered at all, it never becomes a conveyance. So of the treaty; until ratified, the title was in the Indians. The deed might, when delivered, relate back to its date, as between the parties, but not where that relation will affect the rights of third persons. The law, under which the claimants attempt to obtain this land, passed June 19th, 1834. The treaty, by which the United States acquired the Indian title, was ratified in the following February. I think the land was not public land at the passage of the law, but was Indian land. In the Quapaw case (cited heretofore) the Attorney General said, the pre-emption act of 1814 did not authorize the sale of lands ceded by the treaty of 1818, because the Indian title was not extinguished at the passage of the law. I only apply the same principle to these cases. These floats arise under the act of 19th June, 1834, and although the opinion of Mr. Butler may not be so apparently applicable to them, (and I only indulge the remark because counsel have made the distinction,) it nevertheless settles the controversy. The opinion of March 19th, 1836, simply decides, that the title of the United States to certain lands, reserved by Indians in the treaties therein mentioned, did not pass by the reservations, and nothing more. The opinion of April 18th, 1836, decides that an alien may be a pre-emptor, where the local laws authorize him to hold title to real estate. If I understand Mr. Butler, his decisions do not overthrow my conclusion, but sustain it. The cited opinion of the Secretary of the Treasury was given upon the Choctaw treaty of 1831, and the pre-emption acts of 5th April, 1832, and 2d March, 1833. The facts were different from the facts in these cases. The 18th article of that treaty reads as follows:

"The United States shall cause the lands hereby ceded to be surveyed, and surveyors may enter the Choctaw country for that purpose, conducting themselves properly, and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold, before the Choctaws shall remove." By the third article, the Choctaws agreed to remove "the one half in the falls of 1831 and 1832," and the residue in the "fall of 1833." The facts before Mr. Woodbury were, that the applicants had settled on lands which the Choctaws had abandoned, and "who expressed a wish against their removal." The law, under which those settlers claimed, passed after the ratification of that treaty. At its passage the individuals were housekeepers on the lands claimed, the Indians having permitted them to settle there. No doubt in my mind exists as to the power of Congress to grant them the land. It is for that part of the opinion of Mr. Woodbury which says, "I consider the lands as public lands after the cession, &c.," that this case is quoted. An opinion certainly not necessary to determine the case before him, and, as would appear by the action of the then President and Secretary of War, (who ordered the public troops to remove all white persons from the Choctaw cession,) not concurred in by the Executive. In justification of my opinion, and to show that that part of the Secretary's opinion was a hasty *obiter dictum*, and not the true reason of that decision, I cite the last clause of the circular of 1834, explanatory of the act reviving the act of 29 May, 1830, which reads, "the instructions do not apply in any manner to the tracts of country recently obtained by the Government from the Choctaws, &c." Mr. Secretary McLane also decided the same way, April 24, 1833. His written opinion is now on file. The act of 19th June, 1834, is a revival of the act of 29th May, 1830, which prohibits the sale of any land under any of its provisions, "which may have been appropriated for any purposes whatever." By a public treaty, which is a paramount law, the lands in question were appropriated to the exclusive use of the Indians for three years from the date of the treaty, and that time had not elapsed when the act of 19th June, 1834, expired by its own limitation.

I am, most respectfully, your ob'dt servt,

M. BIRCHARD, *Solicitor*.

To JAMES WHITCOMB, ESQ., *Commissioner*.

[The two foregoing opinions accompanied commissioner's letter to Secretary of the Treasury, 16 August, 1837.]

No. 172.

GENERAL LAND OFFICE, SOLICITOR'S BUREAU,
March 14*th*, 1838.

To JAMES WHITCOMB, esq.

SIR: Pursuant to the order of the Secretary of the Treasury, and at your request, I have re-examined the papers in the case of Powell et al., for the purpose of ascertaining whether any new doubt arises on

the question presented to the Attorney General, as stated in his letter to the Secretary, bearing date the 12th instant; and I beg leave to state, that I do not find that any material question has ever been presented which is not substantially decided by my reports. I took the position that the act of 1834 did not authorize a sale of any of the land in question. Surely that covered the whole ground, both the original pre-emptions and floats. No other law authorizes the location of a float.

I presume Mr. Butler's allusion is to some question that was propounded by counsel, after the papers were placed in his hands, probably by parol. Whatever it may have been, so long as I adhere to my former opinion, I shall believe it totally immaterial.

I am, &c., M. BIRCHARD, *Solicitor*.

P. S.—The cases of Powell, Grignon, Nevill, and Gleason, were floats granted to settlers on lands which were liable to pre-emption. I did not receive, or act upon the proof, which was offered to show that they were improperly allowed; but, admitting their correctness, I decided that they could not be located on land to which an original pre-emption was denied to actual settlers. See the 2d and 3d pages of my first report. M. B.

[This opinion accompanied commissioner's letter of 15th March, 1838, to the Secretary of the Treasury.]

GENERAL LAND OFFICE, *June 16th*, 1837.

SIR: I have the honor to inform you that the papers relating to the cases of Powell, Grignon, et al., Wisconsin and Notta-wa-sa-pe Reserve, Michigan, have been carefully examined, and the arguments of claimants by counsel received due consideration; and that a decision has this day been made, that the pre-emption act of 19th June, 1834, will not attach to the land at the mouth of Root river, ceded by the Chicago treaty, 21st February, 1835, or to the reserve above mentioned, in Michigan.

Respectfully, your obedient servant,

JAMES WHITCOMB, *Commissioner*.

To A. BRADLEY, esq., Washington, D. C., or
WM. T. CARROLL, esq., Washington, D. C.

GENERAL LAND OFFICE, 16*th August*, 1837.

SIR: This office having decided against the claims of Powell, Grignon and others, Mr. Carroll has notified me of his desire to appeal to you for a decision; which appeal I have allowed, and enclose herewith the files, to wit:

3 arguments by F. S. Key, Nos. 1, 2, 3.
2 by Mr. Carroll, Nos. 4, 5.
1 by Col. Butterfield, contra, No. 6.
3 by O. P. Lacey, Nos. 7, 8 and 9.
3 copies of Mr. Butlers's opinions, Nos. 10, 11, 12.
2 certificates of Mr. Slaughter, Nos. 13 and 14.
Caveat and affidavits of Paul Kingston, etc., No. 15.

Register and receiver's letter and proof of Powell and Grignon, their certificates and assignment to Carroll Brunelle, No. 16.

Register and receiver's letter, transmitting proof in case of Vaux, with their certificates, No. 17.

Nos. 18, 19, 20, three unimportant letters; also two reports of the solicitor, No. 37 and 61.

I am, &c., JAMES WHITCOMB, *Com'r.*

To LEVI WOODBURY, *Secretary of the Treasury.*

TREASURY DEPARTMENT, 1*st November*, 1837.

SIR: I herewith return to you the papers relating to the cases of Powell, Grignon, and others; and have to inform you, that the Department confirms your decision, approving of the report of the solicitor in those cases. You will please carry that decision into effect, unless the parties should desire the Department, through you, to obtain the opinion of the Attorney General on the points of law involved.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

To Commissioner General Land Office.

GENERAL LAND OFFICE, 15*th March*, 1838.

SIR: In consequence of your endorsement, made on the letter of the Attorney General of the United States, of the 12th inst., returning to you the papers in the cases of Powell, Grignon, and others, in the following words, dated 14th inst:

"Referred to the Commissioner of General Land Office, that the cases referred to by the Attorney General may be re-examined; and if any doubt arises, then the Department will take the opinion of the Attorney General on the new doubts."

I have again considered the subject, and can arrive at no other conclusions than those heretofore expressed, and beg leave to refer you to the accompanying written opinion of the solicitor of this office, in which I concur. With, &c.,

JAMES WHITCOMB, *Commissioner.*

To Hon. Secretary of the Treasury.

TREASURY DEPARTMENT, 19*th March*, 1838.

SIR: After re-examination of the case of Powell, Grignon, and others, referred to in your letter of the 15th inst., and of the views of the solicitor, I am satisfied that the former decision, communicated in my letter of the 1st November last, should be carried into effect.

The papers are accordingly returned.

I am, respectfully, sir, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

To Commissioner of the General Land office.

GENERAL LAND OFFICE, *March 22d*, 1838.

GENTLEMEN: This office having decided that lands acquired by the United States, at the treaty of Chicago, concluded on the 27th September, 1833, but not ratified until the 21st February, 1835, were not subject to the operation of the act of 19th June, 1834, rejected the claims of the following individuals, viz:

Francis Laventure, float N. ½ N. E. qr. 32, 7 N. 22 E per certificate 5
Ebenezer Childs, float lot 2 N. E. fl. qr. 32, 7 N. 22 E. " " 6
James Vaux, pre-emption, N. W. qr. 31, T. 7 N. 22 E. " " 24
Linus Thomson, float lot 3, S. E. qr. 32, 7 N. 22 E. " " 22
Jacques Vaux, and Lewis Vaux, pre-emption, N. W. ¼ N. E and S. ½ N. E. qr. 4, 3 N. 22 E per certificate 1562.
Jacques Vaux, float lots 1 and 2, sect. 9, 3 N. 23 E. per certificate 1563
Lewis Vaux, float lot 6, " " " " " 1564
Robert Grignon, float lot 5, " " " " " 1601
William Powell, float lot 4, " " " " " 1607

Luther Gleason, float lot 3, sec. 9, 3 N. 23 E.
Jas. Nevill, float, E. ½ N. W. qr. " " "
} No entries on applications and tender of money for these tracts.

This decision, on an appeal to the Secretary of the Treasury, having been confirmed by that officer on the 19th inst., and directions given to have the same carried into effect, I have cancelled the certificates above mentioned, viz: 5, 6, 22, 24, 1562, 1563, 1564, 1601, and 1607; and the receiver is authorized to refund to the individuals entitled to receive the same, the amount of purchase money paid for the tracts described in the certificates respectively, taking receipts for the same, which he will forward to this office with his account current for the month in which the repayments may be made, having reference therein to the date of this letter. You are also authorized to permit Linus Thompson, Robert Grignon, and William Powell, to relocate, and Luther Gleason and James Nevill to locate now their floats upon any land in your district now vacant, which was subject to such entry before the expiration of the law under which those floats arose, with the further restriction imposed by my circular of 11th October last, with regard to vacant and unimproved land; provided the claimants, or those interested in those floats, shall, after due notice by you of those instructions, locate the same without unnecessary delay.

The floats of Francis Laventure and Ebenezer Childs, depending upon the validity of their original claim, which is at present suspended, will form the subject of another communication, when authority will be given for their relocation, should it be decided that they are entitled to such right.

Respectfully, your obedient servant,
JAMES WHITCOMB, *Commissioner*.

To Register and Receiver,
Green Bay, Wisconsin Territory.

TREASURY DEPARTMENT, *28th March*, 1838.

SIR: I have heard Mr. Key and counsel again in the cases of Powell

et al., and, after consideration, see no sufficient reason to change my former views. The floats were authorized by the act of June, 1834; and, though they could be laid on any public lands in the district not reserved, yet I am satisfied the law should be construed to apply only to what were then public lands, for such purposes as selling, &c. But the treaty was not ratified by the President till February, 1835, and, by its express terms, was not binding till so ratified. Of course the land covered by it cannot be considered as having been, in June, 1834 public land for this purpose, though it may have been for some other purposes, and in some other senses. The decision in the case cited from the Choctaw reserve is not considered as conflicting with this view.

My former opinion having been communicated to the parties, it would not accord with any correct principle, or with the practice of this Department, (unless strong doubts existed in my mind as to its correctness,) to recall or annul it for the purpose of taking advice of the Attorney General; otherwise it would afford me much pleasure to oblige the parties by so doing.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,

Secretary of the Treasury.

To Commissioner of the General Land Office.

P. S.—The papers are all returned herewith.

GENERAL LAND OFFICE, *March 29th*, 1838.

GENTLEMEN: Since my letter of 22d inst., the case of Childs and Laventure, then suspended for further examination, has been attentively considered, and their joint entry, per certificate No. 4, approved. Their right to floats being also deemed established, you are authorized to permit the relocation of those which, by my letter above mentioned, you were informed had been cancelled: provided the claimants, or those interested in those floats, shall, after due notice by you of these instructions, locate the same without unnecessary delay.

Respectfully, your obedient servant,

JAMES WHITCOMB, *Commissioner.*

To Register and Receiver,
Green Bay, Wisconsin Territory.

GENERAL LAND OFFICE, *December 20th*, 1839

GENTLEMEN: On the 22d March, 1838, a communication was addressed to your office, in reference to certain pre-emption claims, among which was that of Francis Laventure and Ebenezer Childs. The floats of those individuals, as located, were, for the reasons therein given, cancelled, and instructions of the 29th March were furnished you for their relocation, the proof on *file* showing that they were entitled to the floating privilege. It being, however, represented that the original claim was founded on fraud, so far as the right of Ebenezer Childs is concerned, he being at the time, and for some years previous, a resident of Green Bay, and deriving his claim from the purchase of an

alleged improvement made by his father-in-law, Mr. Grignon, who himself lived twenty-five miles distant from the tract upon which improvement is said to exist, and from which the floats are derived, you will consider said instructions for the relocation of *these* floats rescinded; and if application for that purpose should be made, to refer the matter to this office, when a full examination of the subject will be directed. Such an investigation for the purpose of correcting entry No. 4, in the joint names of said Laventure and Childs, in the event of such fraud being proven, would now be given, but for the fact that certificate 4 has been patented, and the control thereof passed from this office; and the only thing left is to prevent the extension of the fraud, if it exists, by controlling the locations of the floats, until all doubt of their legitimate character is removed.

Respectfully, your obedient servant,

JAMES WHITCOMB, *Commissioner*.

To Register and Receiver,
Green Bay, Wisconsin Territory.

GENERAL LAND OFFICE, 14*th August*, 1839.

SIR: I have the honor to enclose herewith duplicate supplements to the list (marked N,) of lands granted to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river, by the act of Congress of the 18th of June, 1838, comprising five tracts of land, which have since been ascertained, according to the decisions of this office, to be vacant public land, situated within the alternate canal sections, and should have been included in the first lists which accompanied my communication to you of the 14th of June last. They are now respectfully submitted for the approval of the President, under the 2d section of the act above referred to, which provides that the Commissioner of the General Land Office shall ascertain, under the direction of the President of the United States, the particular land granted, and shall cause duplicate lists to be prepared, one of which shall be transmitted to the Governor of Wisconsin Territory.

I am, very respectfully, your obedient servant,

JAMES WHITCOMB, *Commissioner*.

To Hon. Secretary of the Treasury.

TREASURY DEPARTMENT, *September 5th*, 1839.

SIR: I return herewith the lists transmitted in your letter of the 14th ult., of certain alternate sections of land granted to the Territory of Wisconsin, under the act of the 18th of June, 1838, for canal purposes, &c., with the approval of the President thereto.

I am, very respectfully, your obedient servant,

LEVI WOODBURY,
Secretary of the Treasury.

TO JAMES WHITCOMB, ESQ.,
Commissioner of the General Land Office.

N.

Supplement to the list of lands granted to the Territory of Wisconsin, by the act of Congress, entitled an act to "grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river," approved on the 18th of June, 1838, which list was approved by the President of the United States on the 15th day of June, 1839, and transmitted to the Governor of Wisconsin, with the letter of the Commissioner of the General Land Office of the 17th of June, 1839, in conformity with the provisions of the 2d section of the act above referred to; since which, the following described tracts have been ascertained to be vacant public lands, situated within the alternate canal sections, and should have been included in the first list.

DESCRIPTION.	Section.	Tp.	Range.	CONTENTS.	
				Acres.	Hdths.
The N. W. $\frac{1}{4}$ of - -	31	7 N.	22 E.	160	00
Lot No. 3, - - -	33	"	"	6	00
Do. 4, - - -	"	"	"	27	80
Do. 5, - - -	"	"	"	18	30
Do. 6, - - -	"	"	"	31	40
Total acres,	-	-	-	243	50

Given under my hand and official seal, this fourteenth day of August, one thousand eight hundred and thirty-nine.

[L. S.]

JAS. WHITCOMB,
Commissioner of the General Land Office.

Approved,

M. VAN BUREN,
President of the United States.

Float.—No. 5.

LAND OFFICE, *Green Bay*, *July* 30, 1835.

It is hereby certified, that, in pursuance of law, Francis Laventure, Brown county, M. T., on this day purchased of the register of this office the lot or N. $\frac{1}{2}$ of N. E. fl. $\frac{1}{4}$, of section number thirty-two, in township number seven N., of range number twenty-two E., containing forty-four $\frac{79}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to fifty-five dollars and ninety-nine cents, for which the said Francis Laventure has made payment in full as required by law.

Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said Francis Laventure shall be entitled to receive a patent for the lot above described.

W. B. SLAUGHTER, *Register*.

5.—Green Bay.—P. E. F.

(Cancelled.)

Land situated within the bounds of the Chicago treaty, &c.

See Solicitor's opinions, 37, 61, and 172. Point settled by decision of Sec'y in cases of Powell, Grignon, and others, at Root river, in his letters of 1st Nov., 1837, and 19 Mar., 1838.

Money ordered to be refunded 22 Mar., 1838. See letter to R. & R. of that date. See letter from Sec'y of the Treasury, 28th Mar., 1838. See letters to R. & R., 29 Mar., 1838, and 20 Dec., 1839.

Description, from quantity and plat, should have been "lot No. 1, of N. E. fl. qr.," instead of "N. $\frac{1}{2}$ of N. E. fl. $\frac{1}{4}$." Correction in this certificate not necessary, the location is void.

Float.—No. 6.

LAND OFFICE, *Green Bay*, *July* 30, 1835.

It is hereby certified, that, in pursuance of law, Ebenezer Childs, of Brown county, M. T., on this day purchased of the register of this office the lot No. 2, of N. E. fl. $\frac{1}{4}$ of section number thirty-two, in township number seven N., of range number twenty-two E., containing forty-two $\frac{60}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to fifty-three dollars and twenty-five cents, for which the said Ebenezer Childs has made payment in full as required by law.

Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said Ebenezer Childs shall be entitled to receive a patent for the lot above described.

W. B. SLAUGHTER, *Register*.

No. 6.—Green Bay.—P. E. F.

(Cancelld.)

Land situated within the bounds of the Chicago treaty, &c.

See Solicitor's opinions, 37, 61, and 172. Letter to Wm. T. Carroll, 16 June, 1837. Appeal taken to Sec'y of Treas'y on this point, in cases of Powell, Grignon, and others. Decision against them sustained by Secretary. See his letters of 1 Nov., 1837, and 19 Mar., 1838. Money ordered to be refunded, 22 Mar., 1838. See letter to R. & R., of that date. See letter from Sec'y of Treasury, 28 Mar., 1838. See letters to R. & R., 29 Mar., 1838, and 20 Dec., 1839.

Float.—No. 22.

LAND OFFICE, *Green Bay*, *August* 3*d*, 1835.

It is hereby certified, that, in pursuance of law, Linus Thompson, of Brown county, M. T., on this day purchased of the register of this office the lot No. 3, of S. E. fl. $\frac{1}{4}$, of section number thirty-two, in township number seven N., of range number twenty-two E., containing fifty-seven $\frac{60}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to seventy-two dollars, for which the said Linus Thompson has made payment in full as required by law.

Now, therefore, be it known, that, on presentation of this certificate to the Commissioner of the General Land Office, the said Linus Thompson shall be entitled to receive a patent for the lot above described.

W. B. SLAUGHTER, *Register*.

Extract from the Tract book, or Record of Sales made at the Green Bay and Milwaukie land offices.

Description of the Tract.				Contents.		Rate per acre.	Purchase money.	Name of purchaser.	Number of Register's ret.	Date of sale.	Number of receipt.	Number of certificate.	
Part of Section.	Section.	Town's'p	Range.	Acres.	100ths.								
N. W. qr.*† - -	31	7	22	160	–	$1 25	$200 00	James Vaux -	2	Aug. 3, 1835	24	24	Cancelled. See Solicitor's G. L. O. Opinions 37, 61, and 172, letters of Sec'y Treas'y, 1 Nov., 1837, & 19 Mar., 1838. Money ordered to be refunded 22 March, 1838.
N. ½ N. E. qr.‡ -	32	‖7	22	44	79	1 25	55 99	Fr's Laventure -	1	July 30, 1835	5	5	Assigned to John P. Arndt & Lewis Rouse. Cancelled. Situated within the bounds of the Chicago treaty. See Solicitor's opinions, 37, 61, & 172, and letters of Secretary Treasury, 1 Nov., 1837,
Lot 2, N. E. fl. qr.§ -	"	"	"	42	60	1 25	53 25	Ebenezer Childs	1	July 30, 1835	6	6	[Assigned to Morgan L. Martin,] and 19 Mar., 1838, in cases of Powell, Grignon & others. Money ordered to be refunded 22 March, 1838.
Lot 3, S. E. fl. qr.¶ -	"	"	"	57	60	1 25	72 00	Linus Thompson	2	Aug. 3, 1835	22	22	Cancelled. Money ordered to be refunded 22 Mar., 1838. For reasons see remarks above, opposite Nos. 5 & 6
N. E. fl. qr., or lots 1, 2, 7, and 8.	"	"	"	143	99	2 50	359 98	Geo. H. Walker	–	Sept. 9, 1842	10,188	10,188	Entered under act of Congress, Aug. 11, 1842, and instructions of commissioner, Aug. 13th, 1842.

*N. W. qr., supplemental grant to Milwaukie and Rock river canal. See letter of Secretary Treasury, dated 5th Sept., 1839, returning list of Commissioner, dated 14th Aug., 1839, marked N., approved by the President of the United States.

†G. B. P. E. act of 1834. ‡G. B. P. E. F. act of 1834. ‖ [Should be lot No. 1.] §G. B. P. E. F. act of 1834. ¶G. B. P. E. F. act of 1834.

[Letters "G. B." above, indicate that the sale was made at Green Bay, when the lands were situated within the bounds of that district. They have since been attached to the Milwaukie land district, and the last recited sale above (No. 10,188) was made at the latter office. The letters "P. E." denote pre-emption, and those of P. E. F," that the sale was by virtue of a pre-emption float.]

22.

Green Bay.—P. E. F.

(*Cancelled.*)

Situated within the bounds of the Chicago treaty.

See opinions of solicitor, Nos. 37, 61, and 172. Letter to Wm. T. Carroll and A. Bradley, 16 June, 1837. Decision of the General Land Office on the point, that the act of 19th June, 1834, did not cover the lands ceded by Chicago treaty, confirmed by Secretary of the Treasury, 1 Nov., 1837, and 19 March, 1838.

Relocation of this float authorized, and money ordered to be refunded on this entry, March 22d, 1838. See letter to R. & R., of that date. See letter from Secretary of the Treasury, 28 March, 1838.

Pre-emption act, 1834.

No. 24.

LAND OFFICE, *Green Bay, Aug. 3d*, 1835.

It is hereby certified, that, in pursuance of law, James Vaux, of Brown county, M. T., on this day purchased of the register of this office the lot or N. W. $\frac{1}{4}$ of section number thirty-one, in township number seven N., of range number twenty-two E., containing one hundred and sixty acres, at the rate of one dollar and twenty-five cents per acre, amounting to two hundred dollars, for which the said James Vaux has made payment in full as required by law.

Now, therefore, be it known, that, on presentation of this certificate to the Comm'ssioner of the General Land Office, the said James Vaux shall be entitled to receive a patent for the lot above described.

W. B. SLAUGHTER, *Register*.

24.

Green Bay.—Pre-emption.

(*Cancelled.*)

See solicitor's opinions, Nos. 37, 61, and 172. Letters of Secretary Treasury, 1 Nov., 1837, and 19 March, 1838.

Money ordered to be refunded, 22 March, 1838. See letter to R. & R., of that date. See also letter from Secretary of the Treasury, 28th March, 1838.

GENERAL LAND OFFICE, *Aug. 13th*, 1842.

GENTLEMEN: I herewith enclose you a copy of the act of Congress, dated the 11th inst., granting to George H. Walker the right to enter at your office the N. E. quarter of section thirty-two, in township seven north, of range twenty-two east, upon the payment by him of the sum of two dollars and fifty cents per acre. The receiver is therefore instructed to receive from him the amount due for the contents of that quarter section, at the rate per acre specified in the act, and the register to issue a certificate for the said land in the usual manner, after such payment is made. The quantity of acres to be paid for, 143 99-100

acres, as indicated by the plats of the surveyor general, and is the aggregate contents of lots 1, 2, 7, and 8, into which said N. E. quarter is shown to have been subdivided. Endorse said certificate and receipt, with a reference to this letter.

Respectfully, your obedient servant,

THO. H. BLAKE, *Comm'r*.

To REGISTER AND RECEIVER,
Milwaukie, Wisconsin Territory.

GENERAL LAND OFFICE, *Nov. 8th*, 1842.

I, Thomas H. Blake, Commissioner of the General Land Office, do hereby certify, that the foregoing twenty-four pages are truly copied from the records and files of this office, page 22 being regarded as comprising the extract from the tract book, as well as the copies of certificates 5, 6, 22, and 24, of the register of the land office at Green Bay, with their respective endorsements. It is also certified, that such extract from the tract book referred to indicates all the sales, or other disposition by the Government, of the land therein referred to.

In testimony whereof, I have hereunto set my name, and caused the [L. S.] seal of the General Land Office to be affixed, the day and date above written.

THOS. H. BLAKE, *Comm'r*.

The counsel for the plaintiff then proved a computation of interest upon the sum of $1800, from Nov. 7, 1836, to April 12th, 1845, amounting to the sum of $1,062 25; and the counsel for the plaintiff then rested his proofs in the then stage of the cause.

The counsel for the defendant then offered to read in evidence on his part, from a book purporting to be a printed copy of the laws enacted by the Legislature of the Territory of Wisconsin, "an act of the said legislature in relation to seals."

The counsel for the plaintiff objected to the evidence as offered, on the ground that the same was not authenticated in such manner as to entitle the same to be read in evidence; and the court overruled the objection; and to the decision thereupon the counsel for the plaintiff excepted.

The counsel for the defendant then read in evidence from said printed book as follows:

SEC. 5. That any instrument to which the person making the same shall affix any device by way of seal, shall be adjudged and held to be of the same force and obligation as if it were actually sealed.

The counsel for the defendant then prayed the *counsel* to instruct the jury, among other things, that no action can be sustained against the defendant in this suit, because the power of attorney executed by the defendant to Elisha Starr did not authorize Elisha Starr to warrant the title of the defendant to any lands which might be sold by him under said power of attorney.

The counsel for the plaintiff then prayed the court to give its instruction to the jury upon the construction of the power of attorney executed

by the defendant to Elisha Starr, so given in evidence at this stage of the cause, as, in the event of such construction being against the existence of such authority in said attorney under said power, the said plaintiff had further evidence to give of the representations of the said agent to the said plaintiff at the time of, and made as a part of, the transaction.

The court reserved for the present their opinion upon the question, for the purpose of hearing the further evidence of the plaintiff, so as to enable him to bring out the whole case, and perhaps thereby save another trial.

To which instruction, so given by the said court, the counsel for the plaintiff then and there excepted.

The counsel for the plaintiff then offered to prove that at the time of negotiating the sale and of selling the land described in said deed to the plaintiff, the said Elisha Starr fraudulently represented to the plaintiff that he, the said Elisha Starr, was authorized by the defendant to warrant the defendant's title to the premises therein described, and withheld from the plaintiff any view of the power of attorney in question; and that the plaintiff refused to make the purchase, or take any conveyance of such lands without such warranty on the part of the defendant.

The counsel for the defendant objected to the evidence so offered as incompetent and inadmissible, and the court sustained the objection, and excluded the testimony; and the counsel for the plaintiff excepted to the decision.

The counsel for the plaintiff next offered to prove that, at the time of the negotiation of the said sale between Starr and the plaintiff, and as a part of the transaction, the said Elisha Starr, as the agent of the defendant, also fraudulently represented to the plaintiff that the defendant had a good and valid title to the land described in the said deed, and that the plaintiff was deceived thereby.

The counsel for the defendant objected to the evidence so offered, and the court overruled the objection, and to the decision thereon the counsel for the defendant excepted.

The counsel for the plaintiff recalled William Beard, who further testified that he was present at the negotiation and bargain between the plaintiff and Elisha Starr, as the agent of the defendant, as to the sale of the acre of land described in said deed; that Mr. Starr stated that the title to the land was good, and there could not be a question about it, because the defendant had the Government title; that it had been sold by the Government about a year previous to that time. That Linus Thompson and others had floated off George Walker who had first settled on it, and claimed a pre-emption right, but who had got no patent; that the defendant's title was direct from the Government, and there was no question about it. Mr. Starr proposed to give to the plaintiff a quit-claim deed, and said it was just as well, as the title came from the Government. The plaintiff said he would not accept it; that he would not take the land unless he had covenants of warranty; and Mr. Starr

then gave the plaintiff the deed read in evidence in this cause. No title papers were produced by Starr, or exhibited to the plaintiff. It was stated in the body of the deed executed by Starr, from whom the defendant had purchased, but he did not exhibit to the plaintiff any papers of any kind. Plaintiff and Mr. Baldwin, and witness all stayed together at the public house kept by Starr. They all went to Milwaukie together for the same purpose; stayed together, purchased together, and left together. The plaintiff did not make any examination of the title that witness knows of. Witness purchased an acre of the defendant of the same title, at the same time, and under the same representations; and witness did not make any examination of title, but relied upon the representations of Mr. Starr; that they all left Milwaukie on the tenth of November, 1836, three days after they made the purchase.

The counsel for the plaintiff then recalled William Beard, who further testified that he had heard the testimony just given by Mr. Baldwin and concurred with him as to the representations made by Mr. Starr, and the acts done by the parties in making such purchase; that he was present and acting with the others in the transaction; that no examination of the title was made by him, nor by either of the others, to his knowledge.

The counsel for the plaintiff next read in evidence from the same volume of the statutes of Wisconsin above referred to, an act of the Legislature of the Territory of Wisconsin, entitled "An act in relation to fraudulent conveyances of lands and the conveyance thereof," the sixth section of said title, in the words and figures following, to wit:

SEC. 6. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

The proofs in the cause were here closed.

The counsel for the defendant prayed the court to instruct the jury—

First. That the plaintiff had not proved the failure of the defendant's title to the lands in question, because he had not shown that the defendant had not acquired a title from the French settlers, or other source than the Government of the United States.

Second. That if it be shown that the defendant claimed title under the Government of the United States, the plaintiff has not shown the title of the defendant to said lands has been legally declared to be invalid. That the certificate of the register of the land office at Green Bay gave a title to the lands, and the only power vested in the officers of the Government at Washington was to see that two patents were not issued for the same land.

Third. That by the acts of Congress granting rights of pre-emption to actual settlers, Linus Thompson had a right to float upon the land in question; and that the decision of the Secretary of the Treasury annulling the certificate of the register was contrary to law, and void.

That under the Chicago treaty the lands in question were public lands at the date of the passage of the said act.

Fourth. That the deed of defendant in evidence in this cause is a sealed instrument by the law of a Territory of Wisconsin, and is to be treated and regarded as a sealed instrument in the State of New York, because of its character at the place where it was made; and that the present action being assumpsit, such cannot be maintained upon the said deed.

Fifth. That no action will lie upon this deed upon a failure of the title to the lands therein described, without express covenants of warranty; there being no valid warranty against the defendant, the plaintiff is not entitled to recover.

Sixth. That the plaintiff is not entitled to recover in this form of action if a fraud be proved in the cause, but should have brought an action on the case for deceit.

The counsel for the plaintiff then prayed the said court to instruct the jury that the action of assumpsit is properly brought in this court upon the promises of the defendant contained in said deed, if any promises are made therein which are binding or obligatory upon the defendant.

The court so instructed the jury, and to such instruction the counsel for the defendant excepted.

The court instructed the jury in respect to the question reserved in the course of the trial, that the power of attorney upon a true construction of its terms and conditions conferred upon the agent authority to give a deed of the land with covenants of warranty, to which the counsel for the defendant then and there excepted.

The jury thereupon, under the charge of the court, rendered a verdict for the plaintiff of $2,862 25 damages, and six cents.

And because none of the exceptions above mentioned do appear in the record and proceedings in the said cause, therefore the said judges have hereunto set their hands and seals, in pursuance of the statute in such case made and provided, this 4th day of August, 1846.

(Signed) S. NELSON, [SEAL.]
(Signed) SAM'L R. BETTS. [SEAL.]

Assignment of error.

SUPREME COURT OF THE UNITED STATES.

JACOB LE ROY, plaintiff in error,
vs.
THEOPHILUS NICHOLS, deft. in error.

And afterwards, to wit, on the first Monday of December, of the term of December, in the year one thousand eight hundred and forty-six aforesaid, before the judges of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Jacob Le Roy, plaintiff in error, by Joseph Blunt, his attorney, and says, that in the record aforesaid, and in the proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, in this, to wit, that the de-

claration aforesaid, and the matters therein contained, are not sufficient in law for the said Theophilus Nichols to have or maintain his aforesaid action thereof against the said Jacob Le Roy; and there is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said Theophilus Nichols against the said Jacob Le Roy, whereas by the law of the land the said judgment ought to have been given for the said Jacob Le Roy against the said Theophilus Nichols. And the said Jacob Le Roy prays that the judgment aforesaid, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing; and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

J. BLUNT,
Atty. for plaintiff in error.
J. BLUNT,
Of counsel.

Joinder in error.

SUPREME COURT OF THE UNITED STATES.

THEOPHILUS NICHOLS, defendant in error,
ads.
JACOB LE ROY, plaintiff in error.

And hereupon, afterwards, to wit, on the first Monday of December, in this same term of December, the said Theophilus Nichols, by John Bigelow, his attorney, freely comes here into court, and says that there is no error, either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the said Supreme Court of the United States, at the Capitol, in the city of Washington, may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

JOHN BIGELOW,
Attorney for defendant in error.
E. SEELEY,
Of counsel.

Filed 14th January, 1847.